APPEAL NO. 992842
FILED FEBRUARY 3, 2000

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Part of the record forwarded to us includes an extended prehearing conference held on an unknown date by a different hearing officer (the first hearing officer). On November 3, 1999, a contested case hearing (CCH) was held in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not sustained a compensable injury in the form of an occupational disease (a rash or contact dermatitis) and that claimant "did not have disability resulting from an occupational disease."

Claimant appealed, contending that his work environment caused his rash and that conclusion was supported by two doctors. Claimant cites two Appeals Panel decisions that purport to say that lay testimony alone can prove causation in a case like this. Claimant further alleges error that the first hearing officer denied subpoenas for any and all reports, notes or other documentation in the possession of the respondent (self-insured) or "any other organization . . . regarding a rash type work related injury." Claimant also contends that he had "disability resulting from an occupational disease." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The self-insured responds to claimant's points, citing that claimant failed to identify what he was alleging caused his rash and, although claimant was seen by a dermatologist and at least two allergists, he has failed to offer any expert opinion from those doctors. The self-insured urges affirmance.

DECISION

Affirmed.

Claimant was employed as a relief parking garage attendant by the self-insured city. As such, he would work in different parking garages while the regular attendants were on lunch or dinner breaks. Claimant normally worked out of a small cubicle. Claimant testified exactly what his duties were, that the conditions were very dirty, and that there were rodents, pigeons and bats and their droppings in and around the garage. It is claimant's contention that something in the environment caused his rash.

Claimant testified that in mid-March 1999 (all dates are in 1999) he began to develop a rash, that it would get better when he was not working and worse when he was working and that he eventually saw [Dr. D], who claimant described as an allergist. The only medical evidence from Dr. D are two return-to-work slips dated March 31st

and April 8th, with the March 31st slip noting "[r]ash," and both slips returning claimant to work the following day. Claimant testified that Dr. D prescribed some medication but that is not evident from the return-to-work slips. Claimant said that he continued to have problems and, on April 11th, he went to a hospital emergency room (ER). The ER note of that date notes "[r]eturn of difficulty breathing swallowing," a rash and a comment "I suggest you see an allergist" (emphasis in the original). A city health district referral slip took claimant off work and commented "I recommend he be rechecked prior to going back to work as he seems to only get his rash when [at] work."

Claimant testified that he returned to work and discussed his condition with his union steward, who referred claimant to [Dr. BB]. In an off-work slip dated April 21st, Dr. BB diagnosed "Acute Dermatitis," took claimant off work and commented "[a]s a result of rash this is causally related to his exposure at work." Dr. BB then referred claimant to [Dr. JB], a dermatologist. No records or reports from Dr. JB are in evidence. Dr. BB, however, did testify at the CCH, where he confirmed that his knowledge of dermatology was limited to a course in his chiropractic training but that he had either reviewed Dr. JB's records or discussed claimant's care with Dr. JB. Dr. BB testified that Dr. JB thought claimant had a "variable diagnosis," that the exact process of claimant's condition "was a little bit perplexing," but that in his opinion, within a reasonable degree of medical probability, the rash was work related. Dr. BB based that opinion on the fact that several other (five or six) of self-insured's garage employees had contracted some kind of dermatitis. In evidence is a city interdepartmental memo entitled "Dermatitis Among Parking Attendants" which indicated claimant's complaint and six other cases. Four of those cases did not have a diagnosis. Claimant had a diagnosis of "Urticaria," as did one other case, and one case had "[i]nsect bites." Claimant's dermatitis was listed as "all over," where the others had listed arms or legs or face or forehead. The employee with the insect bites was listed with a body location of "legs." Claimant submitted transcribed statements of two coworkers who had also developed rashes. In one case, the coworker said she did not know if her rash was the same as claimant's because she had not seen claimant's rash. The other statement said the rashes were the same.

The hearing officer summarized the record, including claimant's and Dr. BB's testimonies, commented that Dr. BB was a chiropractor with a "limited knowledge in the field of dermatology," that Dr. BB had testified that Dr. JB thought claimant "had variable diagnoses" and that the "exact disease process was a little bit perplexing." No blood tests had been conducted, the exact substance which allegedly caused the dermatitis was not identified and the process of how whatever substance was supposedly causing the rash was never explained. Claimant's contention was that it was worse when he was working than when he was not and six other employees had the same (except for

the insect bites) condition, so, therefore, the condition must be work related. The hearing officer concluded:

> Based upon the evidence presented the determination of work relatedness of the Claimant's rash was, at best, speculative. The Claimant did not meet his burden of proof by a preponderance of the evidence to establish a causal connection between his skin conditions and his employment. The proof was also not sufficient to show that he was unable to obtain and retain employment at his pre-injury wage from April 1999 through the date of the hearing.

Claimant appealed, contending that the hearing officer's decision was against the great weight and preponderance of the evidence and that the hearing officer "appears to have used the wrong standard in determining the casual [sic] connection" between the rash and work. Claimant further asserts that the Appeals Panel and the Texas Supreme Court "have found that medical evidence is not required in this type of case to show the casual [sic] connection," citing Texas Workers' Compensation Commission Appeal No. 971224, decided August 14, 1997 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 93065, decided March 10, 1993. Appeal No. 971224, *supra*, is a chemical exposure rash where the Appeals Panel stated:

> Where the causal connection between the employment and the injury is not a matter of general knowledge, the determination of compensability must be established by reasonable medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). . . . However, probative, nonexpert testimony on the circumstances of the employment that are alleged to have caused an immediate or short-term injury may be given through lay testimony. Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993; Morgan v. Compugraphic Corporation, 675 S.W.2d 729 (Tex. 1984).

However, we would add to that comment that the hearing officer is not bound to accept such nonexpert testimony as fact and, as Appeal No. 971224, *supra*, went on to note, the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). That case went on to note that "the hearing officer could conclude, on the basis of lay and medical evidence, that the limited scope of the skin rash" was due to the work. In this case, the hearing officer found, on the basis of lay and medical evidence (testimony from Dr. BB), that the preponderant evidence did not establish a causal connection between the claimant's rash and the duties he performed for the employer. We do not view Appeal No. 971224 as mandating a reversal of the hearing officer's decision which was based on a weighing of the facts.

Similarly, Appeal No. 93065, *supra*, is a contact dermatitis case due to an allergy to certain metals. That case also cites Schaefer, *supra*, and notes that the Texas Supreme Court has set forth three methods of establishing a causal relationship between the injury and the work, citing Parker v. Employers Mutual Liability Ins. Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Appeal No. 93065 goes on to state:

> In addition, where medical science has been able to develop criteria to determine the probability of causal relationship between injury and disability and where the injury is not so complicated as to preclude the fact finder's evaluation of the sequence of events between the injury and disability, the fact finder is permitted to consider testimony of medical possibilities or other scientific generalizations together with the particular sequence of events to determine reasonable medical probability from the evidence as a whole.

These cases merely set out what the hearing officer may consider. Appeal No. 93065 goes on to point out that the hearing officer resolves conflicts and inconsistencies in both the testimony and the medical evidence, citing McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Nothing requires the hearing officer, in this case, to accept the testimony of claimant and Dr. BB as fact or to require that the hearing officer find a causal connection between claimant's unspecific rash and his work.

Claimant, in argument, conceded that we "don't know what causes the rash" and that it would be "cost prohibitive" for claimant to do the investigation necessary to determine the type of agent that causes the rash. In Texas Workers' Compensation Commission Appeal No. 980718, decided May 27, 1998, we held that a "medical opinion that relies on mere possibility, speculation, and surmise is not based on reasonable medical probability, and the fact that this burden of proof may be difficult to meet does not lessen it," also citing Schaefer, *supra.*

Claimant also contends that the hearing officer, or at least the first hearing officer, erred in denying requests for subpoenas which "were reasonably calculated to lead to evidence that supported Claimant's testimony that the work environment was the producing cause of the rash" and that these records (if any existed) were "indispensable" to claimant's case. We note that the record contains an audiotape of over an hour's argument on this point, after which the first hearing officer denied the subpoenas as being "broad and overreaching." We also note that in evidence as claimant's exhibits are self-insured's safety specialist's report, a sanitarian's report, a supervisor's report, various items of self-insured's inter-office E-mail, and statements and reported incidents. Claimant conceded no blood tests were done and no specific substance for which airborne contamination testing could be done was identified other

than rodent, bat and pigeon droppings. Further, the hearing officer issued a subpoena for all reports, notes or other documentation that the self-insured had in its possession as a result of claimant's claim. In any event, we review the hearing officer's ruling on an abuse of discretion standard. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In reviewing for abuse of discretion, we look to see if that hearing officer acted without reference to any guiding rules and principles and the mere fact that a trial judge may decide a matter within his discretion differently than might an appellate judge in similar circumstances does not demonstrate that an abuse of discretion occurred. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985). Unlike the circumstances in Texas Workers' Compensation Commission Appeal No. 93810, decided October 26, 1993, where the hearing officer apparently failed to give any indication in his order as to why he did not find good cause, the first hearing officer in the case we consider indicated that she found the request to be overbroad and overreaching. We note that Rule 177a, Texas Rules of Civil Procedure, provides the court with authority to quash or modify a subpoena if it is unreasonable or oppressive. We do not find the first hearing officer abused her discretion.

Claimant also contends error because the hearing officer made his finding on disability "simply based on the conclusion that there was no compensable injury." That may be so; however, we note that Dr. BB first took claimant off work on April 21st, that claimant testified that he could not perform his preinjury job because of itching, that there was testimony or argument that claimant was subsequently terminated at some date because of unauthorized absences (the self-insured required an off-work slip from a medical doctor and claimant only produced the chiropractic slip of Dr. BB) and that he returned to work for another employer at slightly less than his preinjury wage on October 5th. The hearing officer could accept or reject that evidence of disability or base the finding of no disability on the fact of no compensable injury. Either way, there was sufficient evidence to support the hearing officer's decision.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge